

Sherwood Corporation d/b/a Parkview Manor and American Federation of State, County & Municipal Employees, Local 1199, the National Union of Hospital and Health Care Employees.
Case 25-CA-23169

June 14, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

Upon a charge filed on April 25, 1994, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on May 19, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to provide information following the Union's certification in Case 25-RC-9208. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed in its entirety.

On January 22, 1996, the General Counsel filed a Motion for Summary Judgment. On January 24, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and a Cross-Motion for Summary Judgment. The General Counsel filed an opposition to the Respondent's cross-motion. The Respondent filed a reply to the General Counsel's opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent raises three defenses to its refusal to bargain and provide information. First, the Respondent denies that the Union requested the Respondent to recognize and bargain with it. In its Cross-Motion for Summary Judgment, the Respondent argues that no valid demand for bargaining and for information was ever made by the Union. The Respondent contends that a March 24, 1994 letter requesting bargaining and information was on the letterhead of American Federation of State, County, and Municipal Employees, AFL-CIO, Indiana AFSCME Council 62 and made no mention of Local 1199, the certified bargaining representative of the Respondent's employees. The letter contained neither an explanation of the relationship between the two unions nor any reason why Council 62 was entitled to recognition. Citing *Newell Porcelain*

Co.,¹ the Respondent argues that where a union is certified to represent an employer's employees, the employer is required to recognize and bargain only with that union. The Respondent contends that it had no obligation to recognize, bargain with, or supply information to Council 62, and that Council 62 is the only entity that made such requests.

We reject the Respondent's argument that Local 1199 made no bargaining demand. We find that even if the March 24, 1994 letter was not, in itself, a sufficient demand by Local 1199, the refusal-to-bargain charge filed by Local 1199 on April 25, 1994, referring to that letter clarified any ambiguity as to which entity was requesting bargaining. Thus, the charge, filed little more than 2 months from the date of the certification, clearly alleged that Local 1199 "by letter dated March 24, 1994, requested information from the . . . Employer . . . and requested to bargain with the Employer." Therefore, we find that the charge, together with the letter, constituted a valid demand for bargaining and for information.² Accordingly, we reject the Respondent's defense.

Second, the Respondent asserts as an affirmative defense the argument that the Board improperly overruled the Respondent's objections to the election and improperly included in the bargaining unit individuals whom the Respondent and the Union had stipulated to be supervisors within the meaning of Section 2(11) of the Act and whose duties show they are supervisors under the standard enunciated in the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994).

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.³

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence. However, we find that

¹ 307 NLRB 877 (1992), petition for review denied sub nom. *Electrical Workers UE v. NLRB*, 986 F.2d 70 (4th Cir. 1993).

² See *Williams Enterprises*, 312 NLRB 937, 938-939 (1993), enf. 50 F.3d 1280 (4th Cir. 1995), and cases cited there.

The Respondent's reliance on *Newell Porcelain*, supra, is misplaced. In *Newell Porcelain*, a company obligated to bargain with a newly affiliated union made a good-faith, albeit unsuccessful, effort during negotiations to ascertain that it was in fact negotiating with that union, and was held justified in suspending negotiations pending clarification of the identity of the party with which it was negotiating. By contrast, the Respondent here made no attempt to clarify the ambiguity and ascertain the relationship between Council 62 and Local 1199.

³ *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Cornier Hosiery Mill*, 243 NLRB 19 (1979).

the decision of the Supreme Court in *NLRB v. Health Care & Retirement Corp.*, supra, which issued subsequent to the underlying representation proceeding in this case, constitutes a special circumstance requiring the Board to reexamine its decision in the representation proceeding.⁴ In *Health Care & Retirement Corp.*, the Supreme Court rejected the Board's patient care analysis for determining the supervisory status of charge nurses and found that the Board's construction of the phrase "in the interest of the employer" was "inconsistent with both the statutory language and this Court's precedents." (Id. at 1783.) The hearing officer's report and recommendation, which the Board essentially adopted in the representation phase of this proceeding, used the now-discredited "patient care" analysis in its discussion of the supervisory indicia of assignment and direction. Accordingly, we do not rely on that analysis and have independently reexamined the record in the representation proceeding in light of the Supreme Court's subsequent decision in *Health Care & Retirement Corp.*, supra.⁵

Our review of the record persuades us that the charge nurse's assignment of work and direction of employees in this case is routine and does not require independent judgment. For example, charge nurses make out assignment sheets at the start of each shift and determine which employees are assigned to which residents. In making these assignments, the charge nurse attempts to divide the number of residents evenly among the employees and takes into consideration the skills of the employees. The Board has found, however, that work assignments made to equalize work among employees and assignments based on assessment of employees' skills, when the differences in skills are well known, are routine functions and do not require the exercise of independent judgment.⁶

Although the Employer's handbook provides that charge nurses have the authority to schedule rest or meal breaks, the record indicates that this authority is not generally exercised. Breaktimes are not prescheduled and there is no evidence that employees

must obtain permission from the charge nurse before taking a break. The record shows that employees are not even uniformly required to notify the charge nurse that they are going on break. Under such circumstances, we find that the charge nurses' authority to schedule breaks is limited and that even if the charge nurses have the authority to deny an employee's request for breaktime, this is a routine clerical function not requiring the exercise of independent judgment.⁷

Charge nurses are responsible for determining whether an employee's absence will put the facility below the state-required number of nursing hours per patient. If so, the charge nurse is responsible for calling in off-duty employees to fill the vacancy. In deciding which employees to call, the charge nurses consider the employees' job titles and use their own experience concerning which employees are generally willing to come in. However, the record indicates that charge nurses do not have the authority to compel an employee to come to work or to stay overtime to cover an absence. As the Board found in *Providence Hospital*, supra, at 732, this is essentially a clerical function. "Assessing whether there is a high or low patient census warranting calling in extra help or letting staff off early is not significantly more complicated than counting the number of patients." Thus, we find that without the authority to compel an employee to work, the charge nurses' responsibility to call in employees when necessary under state law requires only routine judgment. For these reasons we agree with the hearing officer that the charge nurses' limited assignment and direction of other employees does not require the use of independent judgment within the meaning of Section 2(11) of the Act.⁸

With regard to the remaining supervisory indicia listed in Section 2(11), the hearing officer found, and we agree, that the charge nurses are not involved in hiring, transferring, laying off, recalling, or adjusting grievances. In section IV,B, of his report, the hearing officer found, and we agree, that the charge nurses do not have the authority to reward or promote or to effectively recommend those actions. We also adopt the hearing officer's findings in section IV,C, of his report that the charge nurses do not have the authority to suspend, discharge, discipline, or to effectively recommend that action.

For these reasons, we conclude that the record supports the hearing officer's determination that the charge nurses are not supervisors. Accordingly, we reaffirm the Certification of Representative issued in Case 25-RC-9208, and find this defense to the 8(a)(5) allegations to be without merit.

⁴ Supplemental Decision and Certification of Representative, Case 25-RC-9208 (Feb. 24, 1994).

As noted by the hearing officer, in directing a hearing on the supervisory status of certain charge nurses notwithstanding the parties' stipulation that they were supervisors, the Board relied on *Rosehill Cemetery Assn.*, 262 NLRB 1289 (1982), which held that stipulations raising either statutory questions or issues affecting Board policy will not be binding on the Board. We find that the Respondent has raised nothing requiring reexamination of that aspect of the Board's decision in the representation proceeding.

⁵ The General Counsel in his opposition has requested that, if the Board deems it necessary to reconsider its Supplemental Decision and Certification in Case 25-RC-9208, the parties be allowed to submit briefs to the Board arguing the application of *NLRB v. Health Care & Retirement Corp.*, supra, and its progeny to the record evidence. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

⁶ See *Providence Hospital*, 320 NLRB 717, 727 (1996).

⁷ *Providence Hospital*, supra, at 732.

⁸ *Ten Broeck Commons*, 320 NLRB 806 (1996); *Providence Hospital*, supra.

Third, the Respondent asserts that more than 12 months have elapsed since the Union's certification, that the Respondent at no time refused to recognize or bargain with the Union, that the presumption of the Union's majority status is now rebuttable, and that a majority of the employees in the bargaining unit have submitted a petition to the Respondent stating that they no longer wish to be represented by the Union. The Respondent attaches a copy of the employee petition to its answer and contends that it no longer has a duty to recognize or bargain with the Union.

We reject the Respondent's defense. In order to assure the parties a reasonable time in which to bargain, the Board, with judicial approval, has adopted a rule requiring an employer, in the absence of unusual circumstances, to honor a certification for a period of 1 year.⁹ Where, as here, the Respondent, through its refusal to bargain, has deprived the Union of that year, the Respondent will not be allowed to take advantage of its failure to comply with its statutory obligation. In such cases, we construe the certification year as commencing on the date on which the Respondent begins to bargain in good faith with the Union.¹⁰ Here, because the Respondent has not yet begun to bargain in good faith, the certification year has not expired and the Union's majority is irrefutable absent unusual circumstances. An employee petition expressing a desire to terminate representation by the certified collective-bargaining representative does not constitute an "unusual circumstance" which would justify the Respondent's refusal to bargain under *Brooks*, supra.¹¹ Accordingly, the Respondent's third defense is without merit.

Finally, we find that there are no factual issues warranting a hearing regarding the Union's request for information. The complaint alleges that by letter dated March 24, 1994, the Union requested the following information from the Respondent:

1. A copy of the payroll to include all employees in the bargaining unit: their names, addresses, job titles, social security numbers, dates of hire and rates of pay;
2. A detailed listing of benefits with two (2) copies each of pertinent documents such as pension plan, health insurance plan, life insurance, personnel manual, etc.; and
3. Job descriptions for all job classifications in the bargaining unit.

In its answer, the Respondent denies that the information requested is relevant and necessary to the Union's role as exclusive bargaining representative of the unit employees. It is well settled, however, that

⁹ *Ray Brooks v. NLRB*, 348 U.S. 96, 101-103 (1954).

¹⁰ *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), enf. 939 F.2d 402 (6th Cir. 1991).

¹¹ *Den-Tal-Ez, Inc.*, 303 NLRB 968, 970 (1991), enf. 986 F.2d 1409 (3d Cir. 1993).

with the exception of employee social security numbers, such information is presumptively relevant for purposes of collective bargaining and must be furnished on request.¹²

Accordingly, we grant the General Counsel's Motion for Summary Judgment, deny the Respondent's Cross-Motion for Summary Judgment, and order the Respondent to bargain and furnish the requested information with the exception of employee social security numbers.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Sherwood Corporation d/b/a Parkview Manor, is a corporation with an office and place of business in Indianapolis, Indiana, where it has been engaged in the operation of a long-term health care facility. During the 12-month period ending April 1, 1994, the Respondent purchased and received at its Indianapolis, Indiana facility goods valued in excess of \$50,000 directly from points outside the State of Indiana. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held January 8, 1993, the Union was certified on February 24, 1994, as the collective-bargaining representative of the employees in the following appropriate unit:

All employees employed by the Employer at its 2424 E. 46th Street, Indianapolis, Indiana facility, including all licensed practical nurses, all graduate practical nurses, all qualified medicine aides, all certified nurse aides and all dietary, housekeeping, laundry and maintenance employees and the activities director and the medical records employees, BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and excluding all supervisory charge nurses, all registered

¹² The Board has held that employee social security numbers are not presumptively relevant and that the union must therefore demonstrate the relevance of such information. See *Heartland of Martinsburg*, 318 NLRB No. 10 (July 31, 1995) (not reported in Board volumes). Here, the Union did not specify in its request why it wanted such information or otherwise demonstrate the relevance of the information. This does not excuse, however, the Respondent's failure to supply all the other information requested by the Union. Such information clearly is presumptively relevant and the Respondent's failure to provide the information on request violated Sec. 8(a)(5) of the Act. See id.

nurses, the respiratory therapist, the social service designee and the bookkeeper.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about April 25, 1994, the Union has requested the Respondent to bargain and to furnish information. Since about the same date, the Respondent has refused the Union's requests. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing, at least since April 25, 1994, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER¹³

The National Labor Relations Board orders that the Respondent, Sherwood Corporation d/b/a Parkview Manor, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with American Federation of State, County & Municipal Employees, Local 1199, the National Union of Hospital and Health Care Employees, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and nec-

¹³The Order conforms to the new standard language recently set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996).

essary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All employees employed by the Employer at its 2424 E. 46th Street, Indianapolis, Indiana facility, including all licensed practical nurses, all graduate practical nurses, all qualified medicine aides, all certified nurse aides and all dietary, housekeeping, laundry and maintenance employees and the activities director and the medical records employees, BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and excluding all supervisory charge nurses, all registered nurses, the respiratory therapist, the social service designee and the bookkeeper.

(b) Furnish the Union the information that it requested with the exception of employee social security numbers.

(c) Within 14 days after service by the Region, post at its Indianapolis, Indiana facility, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 1994.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

¹⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with American Federation of State, County & Municipal Employees, Local 1199, the National Union of Hospital and Health Care Employees as the exclusive representative of the employees in the bargaining unit and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on

terms and conditions of employment for our employees in the bargaining unit:

All employees employed by us at our 2424 E. 46th Street, Indianapolis, Indiana facility, including all licensed practical nurses, all graduate practical nurses, all qualified medicine aides, all certified nurse aides and all dietary, housekeeping, laundry and maintenance employees and the activities director and the medical records employees, BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and excluding all supervisory charge nurses, all registered nurses, the respiratory therapist, the social service designee and the bookkeeper.

WE WILL furnish the Union the information that it requested with the exception of employee social security numbers.

SHERWOOD CORPORATION D/B/A
PARKVIEW MANOR